Supreme Court, U.S.
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No. OFFICE

In The

Supreme Court of the United States

October Term, 1998

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,

Cross-Petitioners,

vs.

EUROPE AND OVERSEAS COMMODITY TRADERS S.A.,

Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

J. PORTIS HICKS
Counsel of Record
FREDERICK A. BRODIE
TAKEMI UENO
WINTHROP, STIMSON,
PUTNAM & ROBERTS
One Battery Park Plaza
New York, New York 10004-1490
(212) 858-1000

Attorneys for Cross-Petitioners

149897

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether, if this Court grants Petitioner's application for a writ of certiorari to review the issue of whether subject matter jurisdiction should be asserted over Petitioner's securities law claims, this Court should also address whether those claims were properly dismissed by the district court on the ground of *forum non conveniens*.

STATEMENT PURSUANT TO RULE 29.6

Cross-Petitioner Banque Paribas (sued herein as Banque Paribas London), which changed its name to Paribas on May 12, 1998, is a French bank. It is wholly owned by Compagnie Financière de Paribas, whose shares are publicly traded. Paribas owns interests in a number of wholly owned and nonwholly owned subsidiaries, none of which are publicly traded.

Cross-Petitioner Paribas Asset Management Ltd. is a Bahamian corporation which is indirectly wholly owned by respondent Paribas. It has no nonwholly owned subsidiaries.

Cross-Petitioner Paribas Global Bond Futures Fund is a Luxembourg mixed capital company, units in which are publicly traded on the Luxembourg stock exchange. It has no nonwholly owned subsidiaries.

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Statute:

28 U.S.C. § 1254(1) 1

Rule:

Supreme Court Rule 12.5 1

Other Authority:

Robert L. Stern *et al., Supreme Court Practice* 364-65 (7th ed. 1993) 6

Paribas (sued herein as Banque Paribas London), Paribas Global Bond Futures Fund (the "Fund"), Paribas Asset Management Ltd. ("PAM"), and John Arida ("Mr. Arida") cross-petition this Court for a writ of certiorari, if the Court grants the Petition of Europe and Overseas Commodity Traders, S.A. ("EOC" or "Petitioner") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (P. App. 1a-29a) is reported at 147 F.3d 118 (2d Cir. 1998). The opinion of the United States District Court for the Southern District of New York (P. App. 30a-54a) is reported at 940 F. Supp. 528 (S.D.N.Y. 1996).

STATEMENT OF JURISDICTION

The court of appeals issued its decision and judgment on June 4, 1998. EOC filed a petition for a writ of certiorari on October 30, 1998, and the petition was placed on the Court's docket on November 4, 1998.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States. This cross-petition is conditioned upon this Court's grant of Petitioner's petition for a writ of certiorari.

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1. EOC's Petition for a Writ of Certiorari will be cited herein as "Pet." The Appendix to EOC's Petition for a Writ of Certiorari will be cited as "P. App." Portions of the record below cited herein, if not appended to EOC's Petition for Certiorari, are appended hereto and cited as "Cross-P. App." Emphasis in passages quoted herein is ours unless otherwise indicated.

STATEMENT OF THE CASE

In October 1992, EOC entered into a non-discretionary investment agreement (the "Investment Agreement") with the London branch office of Paribas and opened an investment account with Paribas (the "London Investment Account"). P. App. 2a, 5a; Cross-P. App. 1a-39a. The Investment Agreement, executed over a year before the investments at issue here were made, states that EOC's country of incorporation is Panama and that its corporate registration address is in Panama. P. App. 5a; Cross-P. App. 35a. EOC's address for correspondence, its principal place of business, the place where its directors' meetings are held, and the place where its shareholders' meetings are held, are all located in the Principality of Monaco. P. App. 5a, 32a & n.3; Cross-P. App. 35a, 37a.

The Investment Agreement states:

> This Agreement is governed by English Law. Disputes arising out of this Agreement shall be subject to the jurisdiction of the English courts to which for [Paribas'] benefit [EOC] submit[s].

Cross-P. App. 22a. In the Investment Agreement, EOC named an agent for service of process in England. P. App. 5a; Cross-P. App. 38a.

In October 1993, EOC began purchasing units of the Fund, a Luxembourg entity. P. App. 5a, 32a. EOC made its initial purchase of Fund units from its London Investment Account after a discussion in England between EOC's shareholder Alan Carr (a Canadian citizen) and Mr. Arida (a U.K. national employed in Paribas' London office). Pet. 3-5; P. App. 2a, 33a-35a, 41a. Later purchases were made by EOC from its London

Investment Account pursuant to orders placed by Mr. Carr on behalf of EOC while Mr. Carr was vacationing in the United States. P. App. 7a, 20a n.12, 41a-42a. During the period October through November 1993, EOC used funds from its London Investment Account to purchase approximately $1,788,800 worth of Fund units. P. App. 33a, 36a, 39a, 41a-42a, 51a.

After the Fund's units decreased in value, EOC brought this action against Paribas, the Fund, Mr. Arida individually, and PAM (a Bahamian corporation that manages the Fund, P. App. 2a), asserting claims under the federal securities laws, Florida Blue Sky laws, and Florida common law. Cross-Petitioners moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction over the Fund, Mr. Arida and PAM, and *forum non conveniens*.[2] In support of their *forum non conveniens* motion, Cross-Petitioners submitted (among other things) an uncontroverted, sworn declaration from an English lawyer experienced in the commercial and business law of England that England would be an adequate alternative forum, offering adequate remedies to Petitioner. Cross-P. App. 40a-55a.

The district court issued a memorandum decision dismissing EOC's complaint on June 19, 1996, which was amended in minor respects on June 28, 1996. Pet. App. 30a-31a. The district court held that: (i) it lacked subject matter jurisdiction of plaintiff's securities law claims; (ii) it lacked personal jurisdiction over the Fund, PAM, and Mr. Arida; and (iii) even if it had jurisdiction, the complaint should be dismissed as to any defendants over whom it could exercise personal jurisdiction on the ground of *forum non conveniens*. P. App. 37a-53a.

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2. The district court directed Cross-Petitioners not to move for dismissal on the ground of failure to state a claim. P. App. 3a.

In ruling on *forum non conveniens*, the district court carefully considered the factors set forth in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947). It found that:

- England is an adequate forum for EOC's claims, P. App. 45a-46a;

- New York is an inconvenient forum, P. App. 47a;

- all the identified witnesses (with the possible exception of Mr. Carr) reside overseas, and it would be extremely inconvenient and prohibitively expensive to transport them to the United States, P. App. 48a-49a;

- five of Cross-Petitioners' witnesses cannot be compelled to testify in the United States, P. App. 48a;

- the dispute between the parties arises out of the Investment Agreement, and is therefore governed by English law and should be heard in an English forum, P. App. 49a-50a, 52a;

- English courts have a greater interest than U.S. courts in adjudicating this case, because "[t]he United Kingdom has a substantial interest in determining whether a British citizen who was employed by the London office of a French bank fraudulently induced the purchase of securities in London," P. App. 51a-52a;

- "this case has little to do with New York or any other jurisdiction in the United States, except for the fortuitous presence of plaintiff's shareholder in Florida at the time of some of the purchases underlying this action," P. App. 51a;

- New York jurors should not be burdened with hearing this case, P. App. 52a; and

- as a forum, New York "is inconvenient to [Cross-Petitioners] out of all proportion to the convenience to the [Petitioner]," P. App. 52a.

EOC appealed. The United States Court of Appeals for the Second Circuit affirmed the district court on June 4, 1998, holding that the district court had properly found that it lacked subject matter jurisdiction. Pet. App. 29a. The court of appeals did not reach the *forum non conveniens* issue.

REASON FOR GRANTING THE WRIT

If this Court grants EOC's petition for a writ of certiorari, Cross-Petitioners might be deemed (absent this cross-petition) to have waived their *forum non conveniens* argument. Cross-Petitioners have filed this cross-petition to preserve their rights to have this case dismissed based on the ground of *forum non conveniens*.

I.

FORUM NON CONVENIENS SHOULD BE PRESERVED AS A GROUND FOR AFFIRMANCE BY THIS COURT

Generally, a respondent in this Court may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the district court or the court of appeals." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see also, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984) ("Respondents . . . may rely on any ground that

finds support in the record."); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924) ("it is . . . settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve . . . an insistence upon matter overlooked or ignored by [the lower court]").

However, issues relating to venue may fall outside this general rule. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 525 (1974) (Douglas, J., dissenting) (respondent has right to urge any argument, "save possibly questions of venue," to support judgment in its favor).[3] In one of the cases cited by Justice Douglas, *Peoria & Pekin Union Railway Co. v. United States*, 263 U.S. 528 (1924), the Court found that the United States had waived the defense of improper venue because, after losing below on the issue of venue, it had failed to cross-appeal. *Id.* at 535-36. The other case cited by Justice Douglas, *American Railway Express*, stated (while discussing *Peoria*): "An objection to venue can be waived at any stage of the proceeding. This Court held that it was waived by failure to take a cross-appeal." 265 U.S. at 436 n.11. *See also* Robert L. Stern *et al.*, *Supreme Court Practice* 364-65 (7th ed. 1993).

Although the instant case involves *forum non conveniens* rather than venue, the doctrine of *forum non conveniens* is viewed as one of venue. *See, e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) ("At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision . . ."; it is, so to speak, a "federal common-law venue rule"). Because the *Peoria* line of cases relating to the waivability of venue might apply to *forum non conveniens*, Cross-Petitioners have filed this conditional cross-petition for certiorari in order to preserve the issue for consideration by

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3. The majority in *Scherk* did not address this issue.

this Court. Judicial economy will be served if all grounds for dismissal raised below are preserved for consideration by this Court. It would unfairly prejudice Cross-Petitioners to have a substantial ground for dismissal excluded from consideration on the basis of waiver. Further, even if this Court does not reach the issue of *forum non conveniens*, it would be dispositive on remand, provided it is not waived.

CONCLUSION

For the reasons set forth above, if the Court grants EOC's petition for a writ of certiorari, it should also grant this conditional cross-petition for a writ of certiorari.

Respectfully submitted,

J. PORTIS HICKS
Counsel of Record
FREDERICK A. BRODIE
TAKEMI UENO
WINTHROP, STIMSON,
PUTNAM & ROBERTS
One Battery Park Plaza
New York, New York 10004-1490
(212) 858-1000

Attorneys for Cross-Petitioners

December 4, 1998

APPENDIX A — BANQUE PARIBAS LONDON INTERNATIONAL PRIVATE BANKING NON-DISCRETIONARY INVESTMENT AGREEMENT (CORPORATIONS) EXECUTED ON OCTOBER 22, 1992

INTERNATIONAL PRIVATE BANKING

NON-DISCRETIONARY INVESTMENT AGREEMENT
CORPORATIONS

BANQUE PARIBAS LONDON

INCORPORATED IN FRANCE WITH LIMITED LIABILITY

Registered Office: 3 RUE D'ANTIN, 75002 PARIS, R.C.
Paris B 662 047 885

MEMBER OF THE SECURITIES AND
FUTURES AUTHORITY

Appendix A

Non-discretionary Investment Agreement
Corporations

April 1992

Dear Client

This Agreement, together with the attached Client Information Form, sets out the terms on which we are willing to provide you with our non-discretionary investment services. If you wish to open more than one non-discretionary investment account with us in the same name, you must complete an additional Client Information Form for each account. The terms on which we will provide you with our non-discretionary investment service in respect of such additional accounts will then be this agreement, together with such additional Client Information Forms as you may complete. References to your "portfolio" shall relate to the investments and other assets managed by us on a non-discretionary basis pursuant to this Agreement and the applicable Client Information Form.

The full name of our firm is Banque Paribas, London, and the address of our principal place of business in London is 68 Lombard Street, London EC3V 9EH.

We are a member of The Securities and Futures Authority ("SFA") and we are regulated by them in the conduct of our investment business.

For the purposes of this Non-Discretionary Investment Management Agreement we propose to treat you as a Private customer.

Appendix A

If you are in agreement with this letter please complete and sign one copy and return it to us. Please note that we will be unable to act as your investment advisor until we have received a completed and signed copy of this letter from you.

1. Our Services

1.1 We will consider, upon your request, providing investment advisory and dealing services in the following investments, together with related research, valuation and safe custody facilities: —

(i) shares in British or foreign companies;

(ii) debenture stock, loan stock, bonds, notes, certificates of deposit, commercial paper or other debt instruments, including government, public agency, municipal and corporate issues;

(iii) warrants to subscribe for investments falling within (i) and (ii) above;

(iv) depository receipts or other types of instrument relating to investments falling within (i), (ii) or (iii) above;

(v) unit trusts, mutual funds and similar schemes in the United Kingdom or elsewhere;

(vi) options on investments falling within (i), (ii) or (iii) above, including options on an option;

(vii) futures on investments falling within (i), (ii) or (iii) above;

(viii) contracts for differences;

(ix) metals;

(x) currencies.

1.2 All transactions will be subject to the rules and customs of the exchange or market and/or any clearing house through which the transactions are executed and to all applicable law, rules and regulations (collectively "applicable regulations") so that: —

(a) if there is any conflict between the provisions of this document and any applicable regulations the latter will prevail;

(b) we may take or omit to take any action we consider fit in order to ensure compliance with any applicable regulations and we shall not be required to do anything or refrain from doing anything which would in our opinion infringe any applicable regulations to which we are subject; and

(c) all applicable regulations and whatever we do or do not do in order to comply with them will be binding on you.

Appendix A

2. Execution-only Arrangements

Please note that we will not advise you about the merits of a particular transaction if we reasonably believe that when you give the order for that transaction, you are not expecting such advice and are dealing on an execution-only basis. In such circumstances, we will inform you at the time that we will execute your order on that basis.

3. Your Investment Objectives

Unless indicated to the contrary on the attached Client Information Form, when advising you, we will have regard to the investment objectives and restrictions (if any) that you specify for your account in the accompanying Client Information Form (which forms part of this Agreement). It is important that you should contact us as soon as possible if you would like to discuss or change your investment objectives or any of the other items in your Form. If you do not specify any investment objectives or restrictions in your Form, we will assume that you do not intend any to apply.

4. Restrictions on Types of Investment

If you do not inform us of any investments or types of investment which you do not wish us to recommend to or purchase for you, we may recommend to you any investment which falls within any of the categories set out in 1.1 above. However, under the rules of the SFA, we may recommend to you only investments which we have reasonable grounds for believing are suitable for you.

Appendix A

5. Charges

Our charges will be in accordance with our published rate card in effect at the time the charges are incurred (a copy of our current rate card accompanies this letter on page 12).

Any alteration to these charges will be notified to you at or before the time of the change.

We may share dealing charges with our associated companies or other third parties, or receive remuneration from them in respect of transactions carried out on your behalf. Details of any such remuneration or sharing arrangements will not be set out on the relevant contract note or confirmation note, but can be made available to you on request.

6. Conflicts of Interest

6.1 Your attention is drawn to the fact that when we deal with or for you or give you investment advice, we, an associated company or some other person connected with us, may have an interest, relationship or arrangement that is material in relation to the investment, transaction or service concerned. However, our employees are required to comply with a policy of independence and to disregard any such interest when making recommendations to you.

6.2 When we recommend a transaction to you or enter into a transaction for you, we or one of our associated companies could be: —

(i) dealing as principal or acting as underwriter for our or its own account by selling the investment concerned to you or buying it from you; or

(ii) matching your transaction with that of another customer by acting on his behalf as well as yours;

(iii) buying or selling units in a collective investment scheme where we are or an associated company is the trustee, operator (or an adviser of the trustee or operator) of the scheme;

(iv) buying investments where we are or an associated company is involved in a new issue, rights issue, takeover or similar transactions concerning the investment.

6.3 Neither we nor any associated company shall be liable to account to you for, or to disclose to you, any profit, charges or other remuneration made or received by us or any associated company from, or by reason of the transaction, or any connected transaction.

6.4 Neither the relationship between us, nor the services to be provided by us nor any recommendation or advice tendered to you, nor any other matter, will give rise to any fiduciary or equitable duties on our part which would oblige us (or any associated company) to accept responsibilities more extensive

than set out in these Terms of Business or which would prevent or hinder us (or any associated company) in carrying out any of the activities specified in 6.2 above.

6.5 Before publishing a research recommendation to our customers (including you) we or any associated company may have acted upon it or made use of information on which it is based. We are not required to see that any advice given to you takes account of any research which has been carried out for us, our affiliated companies or our other customers or that any advice or information we give is given either before or at the same time as it is made available to us, our affiliated companies or our other customers.

7. Aggregation of Orders

We may combine your order with our own orders and orders of other customers. By combining your orders with those of other customers we must reasonably believe that we will obtain a more favourable price than if your order had been executed separately. However, on occasions aggregation may result in you obtaining a less favourable price.

We may arrange for any transaction in relation to which you give instructions to be effected in whole or in part about the same time as, or in concert or conjunction with, the purchase from or the sale to another customer of some or all of such investments. If we do so, we or any associated company may charge, or otherwise take remuneration from, both you and such other customer, and retain any profit,

charges or other remuneration (including without limitation dealer's turn, profit, mark-up or fees) and shall not be bound to account to you for them nor to disclose them to you, except to the extent that disclosure is required by applicable regulations.

8. Default Remedies

8.1 If you fail to make due and punctual payment of any amounts due to us under this or any other connected agreement (such amounts being referred to collectively as the "Debts"), or if you fail to deliver any documents to us when they are due, then without notice to you, we may take any one or more of the actions listed below in addition to pursuing any other remedies available to us in law we may:

(i) take any cash or sell any securities held or controlled by us on your behalf under this or any other connected agreement, and apply the cash or sales proceeds to the satisfaction of the Debts;

(ii) buy back (at your expense) any securities that have been sold by us on your behalf but for which you have failed to deliver the relevant documents or buy (at your expense) any identical securities.

Any such sales or purchases may be effected by us in such a manner and for such prices as we, in our sole discretion, may think fit. You shall be liable to us for the payment of any expenses (including legal fees) incurred by us in

effecting any of our remedies under this clause or in taking any other action necessary to enforce our rights under this agreement and those expenses shall be deemed to form part of the Debts. Interest will be payable by you on any outstanding Debts at the annual rate of 5% in excess of the rate which is charged from time to time by Banque Paribas as its base rate unless otherwise agreed between us at the time.

8.2 Any payment due from you must be made promptly in freely transferable, cleared and immediately available funds without deduction (whether in respect to set off, counter-claim, taxation or otherwise). If you are obliged by any applicable law to make such deduction, you must pay us such amount which after deduction shall ensure that the net amount actually received by us will equal the full amount which would have been received by us had no such deduction been required.

8.3 You will bear all costs and risks of payment and delivery by or to us or our order, whether upon settlement of any transaction, termination of these Terms of Business or otherwise.

8.4 If you default in or fail to perform or otherwise repudiate any transaction with us or any associated company, become insolvent or become the subject of any winding-up order, or if any liquidator or administrator is appointed in respect of you, or if you otherwise become the subject of any equivalent procedures under any relevant liquidation, bankruptcy, re-organisation or similar law, we may without prior notice to you: —

(a) cancel or otherwise liquidate any transaction between us;

(b) sell any of your property in our possession or under our control; and

(c) set off any obligation to you against any of your obligations to us.

All investments held by us for your account shall be subject to a general lien in our favour, insofar as there remains due from you to us any outstanding monies, investments or other indebtedness or liabilities of whatever nature.

9. Non-Readily Realisable Investments

We may enter into transactions on your behalf in non-readily realisable investments. These are investments in which the market is limited or could become so; they can be difficult to deal in and it can be difficult to assess what would be a proper market price for them. Please inform us if you do not wish to be advised in respect of such investments.

10. Off-Exchange Transactions

We may deal for you in circumstances in which the relevant deal is not regulated by the rules of any stock exchange or investment exchange. Please inform us if you do not wish us to enter into such transactions for you.

Appendix A

11. Stabilisation

We may deal for you in investments that may have been the subject of stabilisation. Stabilisation is a price supporting process that may take place in the context of new issues. The effect of stabilisation can be to make the market price of the new issue temporarily higher than it would otherwise be. The market price of investments of the same class already in issue, and of other investments whose price affects the price of the new issue may also be affected.

This process is undertaken in order to ensure that the issue of investments is introduced to the market in an orderly fashion, and that the issue price and/or the price of associated investments is not artificially depressed because of the increase in supply caused by the new issue.

Stabilisation may only take place for a limited period, and there are limits on the price at which shares, warrants and depositary receipts may be stabilised (although there are no limits in respect of loan stock and bonds.)

Please inform us if you do not wish to be advised in respect of such investments, or you do not wish us to enter into transactions in such investments.

12. Custody of your Investments

12.1 All securities or unit trusts purchased through us will be registered (except for bearer stocks) in your name, or in the name of an eligible nominee or eligible custodian in accordance with the rules of SFA.

12.2 In the case of UK registered investments, which we are holding on your behalf these may be registered in the name, or held for the account, of our nominee company Paribas Nominees Limited. All bearer investments (other than scrip issued in respect of your registered investments) may be held by or for the account of either Banque Paribas or Paribas Nominees Limited. The investments or the relevant documents of title or certificates evidencing title held on your behalf will not be lent to a third party without your prior written approval (See also 20. below).

12.3 If (but only if) you choose to use our foreign nominee and safe custody services, the certificates and other title documents relating to your non-UK investments will be held by us in safe custody accounts which we maintain in our name (but designated as holding clients' securities) with banks or depositories outside the UK in accordance with the rules of SFA (each a "Custodian"). The Custodians may include Banque Paribas or other connected companies.

12.4 Where appropriate, your non-UK securities will be registered in the name of a nominee account maintained by a Custodian or one of its subsidiaries, or in the name of one of our wholly owned nominees.

13. Dividends

We will account to you promptly for all dividends, interest payments and other rights accruing to you.

Appendix A

We will obtain your instructions before: —

(i) exercising on your behalf conversion and subscription rights and voting rights regarding your holdings; and

(ii) proceeding on your behalf in takeover situations, other offers or capital re-organisations concerning your holdings.

Should you fail to provide instructions by the stated time once notification has been given we cannot be held liable to you for the outcome of such situations.

14. Exemptions from Liability

We shall not be liable for:

(i) any loss of opportunity whereby the value of any securities purchased, held or sold by us on your behalf or which we have advised you to purchase, hold or sell might have been increased; or

(ii) any decline in the value of any securities purchased or held by us on your behalf or which we have advised you to purchase or hold or howsoever rising; or

(iii) for any errors of fact or judgement howsoever arising; or

(iv) for any acts or omissions of any third party.

except in so far as the same arises as a result of our wilful default, negligence or breach of the rules of SFA, but nothing in this Paragraph shall limit your rights under Section 62 of the Financial Services Act 1986. For the avoidance of doubt, the expression "held by us on your behalf" shall include the foreign investments referred to in Clause 12.

In the event of a default by an eligible custodian used by us we will not be liable.

15. Margining Arrangements

Unless otherwise agreed between us in writing we will assume that you do not wish to enter into transactions in the following types of investments which will result in you having to provide margin payments.

Transactions in options
Transactions in futures
Transactions in contracts for differences.

16. Underwriting/Sub-Underwriting Commitments

Unless otherwise agreed between us in writing we will assume that you do not wish us to advise you on transactions for you which commit you to underwriting or similar obligations in connection with a new issue, rights issue, takeover or similar transaction.

17. Money Held on your behalf (Client Money)

We are obliged to treat money held by us on your behalf in accordance with the Securities and Investments Board's

Client Money Regulations. Among other things, this requires us to hold your money in a bank account at an approved bank.

The approved bank at which your money is held may be ourselves.

18. Lending or Pledging Collateral

Please indicate in the declaration at the end of this Agreement whether or not we may pledge or charge to a third party collateral deposited with us (other than for safe custody), for the third party to use as collateral for its own obligations. Such collateral registered with a third party will not be in your name.

19. Settlements of Transactions and Amounts due

Commissions, charges and, when appropriate, Value Added Tax will be added to the cost of purchases and deducted from the proceeds of sales. All payments and (if we do not already hold them) all share certificates and other documents required to settle your transactions must be delivered by you in time to enable us to complete settlement promptly.

Any amounts which you owe us in connection with any discretionary or non-discretionary account you have with us may be set off against amounts we owe you without prior reference to you. We may deduct our fees and any other amounts due to us from any funds we hold for you.

Appendix A

20. Clients' Instructions

You should specify on your Client Information Form the name of any person whom you have authorised to give us instructions or authorisation on your behalf, and any limitations on that authority. You agree that we will not be liable to you in any way for acting on the instructions or relying on the authorisations of that person (within any limits you have specified). If that person receives a portion of the commissions you pay us, that will be shown on the relevant contract note.

We will only accept such instructions when we are in receipt of a duly authorised Power of Attorney together with specimen signatures.

21. Takeover Panel

You should be aware that we are required to co-operate with the Panel on Takeovers and Mergers in its dealing inquiries, and this may involve disclosing to the Panel relevant information with respect to dealings in securities, including the identity of our clients.

22. Commencement, Amendment and Termination

This agreement shall take effect when a copy of this letter and the attached Client Information Form has been returned to us duly signed by you or on your behalf. This agreement may be amended by us by sending you written notice of the amendments at least 30 days before they go into effect. Either of us may terminate this agreement, subject to the settlement of any outstanding transactions, by giving the other written notice.

Appendix A

23. Previous Agreements

This Agreement supersedes any previous agreement with us, and the benefit of the Agreement shall not be assignable by either party without the prior consent of the other.

24. Confidentiality

24.1 Except as required by the rules of the SFA, neither we nor any associated company need to disclose to you or take into consideration any act, matter or thing: —

(i) if any disclosure would or might be a breach of duty or confidence to any other person; or

(ii) which comes to the notice of any of our directors, employees or agents or those of any of our associated companies, and does not come to the actual notice of the individual or individuals executing the transaction or otherwise providing services to you; or

(iii) in respect of any investments other than any price quoted by is and sufficient information to identify the class of investments concerned; or

(iv) relating to the nature or extent of any interest we or any associated company has in any investments.

Appendix A

You acknowledge that we have not made, and you are not relying on, any statements, representations, promises or undertakings that are not contained herein. Any advice by any of our directors, officers, employees or agents to you in relation to any transaction shall be given in good faith without any obligation to communicate to you the basis on which he or it has made the judgement leading to such advice.

24.2 We undertake to keep all information we receive in connection with this Agreement private and confidential, and will not be disclosed to any person except to the extent that: —

(a) you give your prior consent;

(b) we are required to disclose the information by the SFA, the Securities Investments Board, the Bank of England, the London Stock Exchange or any other recognised investment exchange, the City Panel on Takeovers and Mergers or any other regulatory authority having jurisdiction over us or applicable English law; or

(c) the disclosure is necessary to carry out our obligations under this Agreement; or

(d) the disclosure is made to associated companies or their professional advisers.

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25. Recording of Telephone Calls

Any telephone conversations between us may be recorded. All instructions received by telephone will be binding as if received in writing.

26. General

26.1 You confirm and undertake that, subject to this Agreement, and unless we agree otherwise, your investments to which this Agreement may apply are and will be while this agreement is in force) free from any charge, lien, pledge or encumbrance and, unless you are a trustee, beneficially owned by you.

26.2 You confirm and undertake that you have and will have all necessary consents, and, if you are not an individual, powers in your constitution) and authorises to enable all transactions in investments under this Agreement to be effected and you to comply with all your obligations hereunder.

26.3 You confirm that any information that has been or may from time to time be provided by you, including (without limitation) any relating to your financial position, is complete, accurate and not misleading in any material respect.

26.4 You undertake that, whenever you act as disclosed agent for another, in doing so, you have express authority to instruct us on the terms of this Agreement.

26.5 Your rights under this Agreement and/or any transactions effected under them are not capable of assignment and your obligations shall not, without our consent, be capable of performance by anybody else.

27. Joint Customers

27.1 Where this Agreement is with more than one person: —

27.1.1 any instruction, notice, demand, acknowledgement or request to be given by or to you under this Agreement may be given by or to any one of you. We need not enquire as to the authority of that person. That person may give us an effective and final discharge in respect of any of our obligations; and

27.1.2 your liabilities under or in connection with this Agreement are joint and several; and

27.1.3 on the death or dissolution of any one of you, we may treat the survivor(s) as the only person(s) entitled to your investment.

27.2 Where you are one or more trustees, you: —

27.2.2 will notify us of any changes in trustee(s) of the relevant trust; and

27.2.3 confirm that on the basis of competent legal advice, you are all satisfied that each of you has the necessary powers to enter into this Agreement.

28. Invalidity of Provisions

Each provision of this agreement is severable and if any provision of this Agreement is or become invalid or contravenes the prevailing rules of the SFA the remaining provisions will not be affected.

29. Events beyond our control

We shall not be obliged to take or refrain from taking any action which it becomes beyond our power to take or refrain from taking wholly or partly as a result of an event or state of affairs (including any change in the law or any official directive or policy whether in the United Kingdom or elsewhere) which it was beyond our control to prevent and the effect of which is beyond our power to avoid, including (without limitation) any breakdown or failure of transmission or communication or computer facilities, postal or other strikes or similar industrial action.

30. Governing Law

This Agreement is governed by English Law. Disputes arising out of this Agreement shall be subject to the jurisdiction of the English courts to which for our benefit you submit. The benefit of the Agreement shall not be assignable by either party without the prior consent of the other.

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If you agree to this Agreement, please complete and sign one copy of this Agreement on page 21 and the accompanying Client Information Form and return a signed copy to us. Please keep one copy of this Agreement, for your records.

If there is anything you would like to clarify, please contact us before you sign and return this Agreement.

Yours faithfully

For and on behalf of
Banque Paribas, London

Appendix A

SCHEDULE OF FEES & COMMISSIONS

ADVISORY INVESTMENT SERVICES (NON DISCRETIONARY)

1. Non-Discretionary Fees (per annum)

A safekeeping fee of 0.25% per annum will be charged to your account quarterly in arrears, where appropriate and calculated on the market value of the assets in your Investment Account. This fee includes sake-keeping, interest/dividend collections, but excludes brokers, correspondent, transaction and other charges and taxes and duties where applicable. These will be charged as and when they occur.

2. Non-Discretionary Commissions (per transaction)

a. Money Market Instruments	:	0.125%
b. Bonds & Convertibles	:	0.5%
c. Equities	:	First US$50,000 — 1.4% Next US$50,000 — 0.5% Thereafter — 0.375%
d. Precious Metals	:	0.5% (plus quarterly safe keeping charges — 0.25%)
e. Options	:	1%
f. Warrants	:	0.5%
g. Minimum Transaction Fee	:	US$100 (or equivalent)

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3. Correspondent Charges

Maximum charge of 0.125% per annum of the portfolio value, debited quarterly in arrears.

4. Hold All Mail

A charge of US$200 (or equivalent) per annum debited quarterly in arrears.

WARRANTS RISK WARNING NOTICE

This notice is provided to you, as a private customer, in compliance with the rules of The Securities and Futures Authority (SFA). Private customers are afforded greater protections under these rules than other customers, and you should ensure that your broker tells you what these are. This notice cannot disclose all of the risks and other significant aspects of warrants. You should not deal in them unless you understand the nature of the transaction you are entering into and the extent of your exposure to potential loss.

You should consider carefully whether warrants are suitable for you in the light of your circumstances and financial position. In deciding whether to trade, you should be aware of the following matters.

Warrants

1. A warrant is a right to subscribe for shares, debentures, loan stock or government securities, and is exercisable against the original issuer of the securities. Warrants often

involve a high degree of gearing, so that a relatively small movement in the price of the underlying security results in a disproportionately large movement in the price of the warrant. The prices of warrants can therefore be volatile.

You should not buy a warrant unless you are prepared to sustain a total loss of the money you have invested plus any commission or other transaction charges.

Some other instruments are also called warrants but are actually options (for example, a night to acquire securities which is exercisable against someone other than the original issuer of the securities, often called a "covered warrant").

Off-Exchange Transactions

2. Transactions in off-exchange warrants may involve greater risk than dealing in exchange traded warrants because there is no exchange market through which to liquidate your position, to assess the value of the warrant or the exposure to risk. Bid and offer prices need not be quoted, and even where they are, they will be established by dealers in these instruments and consequently it may be difficult to establish what is a fair price.

   Your broker must make it clear to you if you are entering into an off-exchange transaction and advise you of any risks involved.

Commissions

3. Before you begin to trade you should have details of all commissions and other charges for which you will be liable.

Appendix A

Foreign Markets

4. Foreign markets will involve different risks to UK markets. In some cases the risks will be greater. On request, your broker must provide an explanation of the protections which will operate in any relevant foreign markets, including the extent to which he will accept liability for any default of a foreign broker through whom he deals. The potential for profit or loss from transactions on foreign markets will be affected by fluctuations in foreign exchange rates.

DERIVATIVES RISK WARNING NOTICE

This notice is provided to you as a private customer in compliance with the rules of the Securities and Futures Authority (SFA). Private customers are afforded greater protections under these rules than other customers, and you should ensure that your broker tells you what these are. This notice does not disclose all of the risks and other significant aspects of derivatives products such as futures, options, and contracts for differences. You should not deal in derivatives unless you understand the nature of the contract you are entering into and the extent of your exposure to risk. You should also be satisfied that the contract is suitable for you in the light of your circumstances and financial position. Certain strategies such as a "spread" position or a "straddle", may be as risky as a simple "long" or "short" position.

Whilst derivative instruments can be utilised for the management of investment risk, some investments are unsuitable for many investors. Different instruments

involve different levels of exposure to risk, and in deciding whether to trade in such instruments you should be aware of the following points.

Futures

1. Transactions in futures involve the obligations to make, or to take delivery of the underlying assets of the contract at a future date, or in some cases to settle your position with cash. They carry a high degree of risk. The "gearing" or "leverage" often obtainable in futures trading means that a small deposit or down payment can lead to large losses, as well as gains. It also means that a relatively small market movement can lead to a proportionately much larger movement in the value of your investment, and this can work against you, as well as for you. Futures transactions have a contingent liability, and you should be aware of the implications of this, in particular the margining requirements, which are set out in paragraph (6) below.

Options

2. There are many different types of options with different characteristics subject to different conditions —

Buying options:

Buying options involves less risk than selling options because, if the price of the underlying asset moves against you, you can simply allow the option to lapse. The maximum loss is limited to the premium, plus any commission or other transaction charges. However, if you buy a call option on a futures contract and you later exercise

the option, you will acquire the future. This will expose you in the risk described under "futures" and "contingent liability transactions."

Writing options:

If you write an option, the risk involved is considerably greater than buying options. You may be liable for margin to maintain your position and a loss may be sustained well in excess of any premium received. By writing an option, you accept a legal obligation to purchase or sell the underlying asset if the option is exercised against you, however far the market price has moved away from the exercise price. If you already own the underlying asset which you have contracted to sell (known as "covered call options") the risk can be unlimited. Only experienced persons should contemplate writing uncovered options, and then only after securing full details of the applicable conditions and potential risk exposure.

Traditional options:

A particular type of option called a "traditional option" is written by certain London Stock Exchange firms under special exchange rules. These may involve greater risk than other options. Two way prices are not usually quoted and there is no exchange market on which to close out an open position or to effect an equal and opposite transaction to reverse an open position. It may be difficult to assess its value or for the seller of such an option to manage his exposure to risk.

Certain options markets operate on a margined basis, under which buyers do not pay the full premium on their option

at the time they purchase it. In this situation you may subsequently be called upon to pay margin on the option up to the level of your premium. If you fail to do so as required, your position may be closed or liquidated in the same way as a futures position.

Contracts for differences

3. Futures and options contracts can also be referred to as Contract for Differences. These can be options and futures on the FTSE 100 index or any other index, as well as currency and interest rate swaps. However, unlike other futures and options, these contracts can only be settled in cash. Investing in a contract for differences carries the same risks as investing in a future or an option and you should be aware of these as set out in paragraphs (1) and (2) respectively. Transactions in contracts for differences may also have a contingent liability and you should be aware of the implications of this as set out in the paragraph (6) below.

Off exchange transactions

4. It may not always be apparent whether or not a particular derivative is on or off-exchange. Your broker must make it clear to you if you are entering into an off-exchange derivative transaction. Under the rules of SFA off-exchange transactions which have a contingent liability (see paragraph 6) are only permitted where it is for the purpose of protecting your assets against currency fluctuations.

While some off-exchange markets are highly liquid, transactions in off-exchange or "nontransferable"

derivatives may involve greater risk than investing in on-exchange derivatives because there is no exchange market on which to close out an open position. It may be impossible to liquidate an existing position, to assess the value of the position arising from an off-exchange transaction or to assess the exposure risk. Bid and offer prices need not be quoted, and, even where they are, they will be established by dealers in these instruments and consequently it may be difficult to establish what is a fair price.

Foreign markets

5. Foreign markets will involve different risks to UK markets. In some cases the risk will be greater. On request, your broker must provide an explanation of the relevant risk and protections (if any), which will operate in any relevant foreign markets, including the extent to which he will accept liability for any default of a foreign broker through whom he deals. The potential for profit or loss from transactions on foreign markets or in foreign denominated contracts will be affected by fluctuations in foreign exchange rates.

Contingent liability transactions

6. Contingent liability transactions which are margined require you to make a series of payments against the purchase price, instead of paying the whole purchase price immediately.

If you trade in futures, contracts for differences or sell options you may sustain a total loss of the margin you deposit with your broker to establish or maintain a position.

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If the market moves against you, you may be called upon to pay substantial additional margin at short notice to maintain the position. If you fail to do so within the time required, your position may be liquidated at a loss and you will be liable for any resulting deficit.

Even if a transaction is not margined, it may still carry an obligation to make further payments in certain circumstances over and above any amount paid when you entered the contract.

Except in specific circumstances under SFA rules, your broker may only carry out margined or other contingent liability transactions with or for you if they are traded on or under the rules of a recognised or designated investment exchange. Contingent liability transactions which are not traded on or under the rules of a recognised or designated investment exchange may expose you to substantially greater risks.

Collateral

7. If you deposit collateral as security with your broker, the way in which it will be treated will vary according to the type of transaction and where it is traded. There could be significant differences in the treatment of your collateral depending on whether you are trading on a recognised or designated investment exchange, with the rules of that exchange (and associated clearing house) applying, or trading off exchange. Deposited collateral may lose its identity as your property once dealings on your behalf are undertaken. Even if your dealings should ultimately prove profitable, you may not get back the same assets which

you deposited and may have to accept payment in cash. You should ascertain from your broker how your collateral will be dealt with.

Commissions

8. Before you begin to trade, you should obtain details of all commissions and other charges for which you will be liable. If any charges are not expressed in money terms (but, for example, as a percentage of contract value), you should obtain a clear written explanation, including appropriate examples, to establish what such charges are likely to mean in specific money terms. In the case of futures, when commission is charged as a percentage, it will normally be as a percentage of the total contract value, and not simply as a percentage of your initial payment.

Suspensions of trading

9. Under certain trading conditions it may be difficult or impossible to liquidate a position. This may occur, for example, at times of rapid price movement if the price rises or falls in one trading session to such an extent that under the rules of the relevant exchange trading is suspended or restricted. Placing a stop-loss order will not necessarily limit your losses to the intended amounts, because market conditions may make it impossible to execute such an order at the stipulated price.

Clearing house protections

10. On many exchanges, the performance of a transaction by your broker (or the third party with whom he is dealing on

your behalf) is "guaranteed" by the exchange or its clearing house. However, this guarantee is unlikely in most circumstances to cover you, the customer, and may not protect you if your broker or another party defaults on its obligations to protect you. On request, your broker must explain any protection provided to you under the clearing guarantee applicable to any on-exchange derivatives in which you are dealing. There is no clearing house for traditional options, nor normally for off-exchange instruments which are not traded under the rules of a recognised or designated investment exchange.

Insolvency

11. Your broker's insolvency or default, or that of any brokers involved with your transaction, may lead to positions being liquidated or closed out without your consent. In certain circumstances, you may not get back the actual assets which you lodged as collateral and you may have to accept any available payment in cash. On request, your broker must provide an explanation of the extent to which he will accept liability for any insolvency of, or default by, other brokers involved with your transactions.

Appendix A

Client Information Form
Corporations

PERSONAL DETAILS

Corporate Name	Europe & Overseas Commodity Traders S.A.
Date of Incorporation	21.07.82
Country of Incorporation	Panama
Address for registration	Apt. 7443 Panama 5 Panama

* * *

Names of Directors	Ian Fledger, Herbert W. Marvelly, Elayne V. Murphy
Correspondence address, if different from registration address	Georgam Sam, BP 182, 38 BD Des Moulins, MC98004, Monaco Cedex

* * *

Frequency of statements Monthly

Are you subject to UK income tax? Yes (No)

If no, please complete the attached form

* * *

Appendix A

FOR INTERNAL USE ONLY

Reference _____		Language	English
Accounts to be linked to account no. _____		Frequency of statement	Monthly
Client introduced by	J.A.	Managed by	J.A.

* * *

Appendix A

PLEASE COMPLETE AND SIGN

TAX DECLARATION

It is essential that you complete this form otherwise we will be required to deduct UK withholding tax from all dividend, coupon and interest receipt which we receive on your behalf.

1. Full legal name of company
   Europe & Overseas Commodity Traders S.A.

2. Address and, if different, place of business
   38 BD Des Moulins, MC98000 Monaco

* * *

5. Are the company's shares quoted on the stock exchange?
   ~~YES~~/NO

* * *

If NO, please state the full names, nationality and residential addresses of all directors who have held office during the last five years. (Please supply details on a separate schedule.)

6. Where are the directors' meetings held?
   38 BD Des Moulins, MC98000 Monaco

7. Where are the shareholders' meetings held?
   35 BD Des Moulins, MC98000 Monac

8. Please state the full names and residential address of any person resident in the United Kingdom (including a

company) exercising or able to exercise, directly or indirectly, effective voting control through a beneficial shareholding in the company. (Please supply details on a separate schedule.)

9. If any functions of control have been delegated by the directors, please state the full names, nationality and residential addresses of the persons concerned. (Please supply details on a separate schedule.)

10. My/Our agent for services of process in England is
3 Albany Courtyard
London W1V 9RA

(Address in England)

Signed s/ Ian F. Ledger, Herbert W. Marvelly
Dated 22.10.92

(Please print the name of the signatory and the capacity in which he or she signs)

Ian F. Ledger, Herbert W. Marvelly
Directors

Appendix A

ACCEPTANCE OF AGREEMENT TERMS

I/we confirm my/our acceptance of the terms of the Non-Discretionary Investment Agreement set out on pages 1 to 11.

*I/we also confirm that Banque Paribas is permitted to pledge or charge to a third party collateral deposited with us (other than for safe custody), for the third party to use as collateral for its own obligations. Such collateral registered with a third party will not be in the my/our name. I/we agree to collateral being returned to Banque Paribas which is equivalent but not identical to collateral originally deposited with the firm.

*I/we confirm that I/we have read and understood the Warrants Risk Warning Notice set out on page 13.

*I/we confirm that I/we have read and understood the Derivatives Risk Warning Notice set out on page 14.

I/we confirm that our investment objectives are set out in the Client Information Form on pages 18 to 19.

I/we confirm that the details set out in the Tax Declaration on pages 20 to 21 are correct.

Signed s/ Ian Fledger Date 22.10.92
Name and Title Ian Fledger, Director

Signed s/ Herbert W. Marvelly Date 22.10.92
Name and Title Herbert W. Marvelly, Director

* *Please delete as applicable*

APPENDIX B — DECLARATION OF ANDREW CHARLES SMITH IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT DATED APRIL 12, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDEX No. 94 Civ. 7471

EUROPE AND OVERSEAS COMMODITY TRADERS S.A.

Plaintiff

- against -

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD and JOHN ARIDA

Defendants

DECLARATION OF ANDREW CHARLES SMITH IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I, ANDREW CHARLES SMITH of Fountain Court, Temple, London EC4Y 9DH, do hereby declare: —

INTRODUCTION

1. I make this declaration at the request of the Defendants in the above proceedings. Except where otherwise stated, this declaration is based upon my own personal knowledge. The declaration is made in support of the Defendants' motion

to dismiss the complaint filed against them by the Plaintiff, Europe & Overseas Commodity Traders SA ("EOC"), in the United States District Court for the Southern District of New York.

QUALIFICATIONS

2. I was educated at Wadham College, Oxford, where I obtained degrees of Bachelor of Arts in Literae Humaniores and in Jurisprudence (First Class). I was awarded the Astbury Scholarship to the Middle Temple and was called to the Bar of England and Wales in November 1974. In 1990 I was appointed a Queen's Counsel.

3. My practice involves primarily commercial work, including all types of business, commercial and jurisdictional disputes. The emphasis of my practice is upon banking, insurance and reinsurance, professional negligence and dry shipping/international trade. I also sat as an arbitrator.

4. In 1979 I was appointed to the County Court Rules Committee by the Lord Chancellor and served until 1983. In 1986 I was appointed to the Queen's Bench Procedure Committee and served until 1990. I was elected Secretary of London Common Law & Commercial Bar Association from 1983 until 1991. In 1991 I was appointed as an Assistant Recorder by the Lord Chancellor and in 1993 I was appointed as an Assistant Parliamentary Boundary Commissioner by the Home Secretary. In 1994 I was the Vice-Chairman of the Bar Standards Review Body.

EOC'S COMPLAINT

5. I understand that by its complaint EOC seeks relief against the Defendants: —

(i) pursuant to the securities laws of the United States; and

(ii) pursuant to Florida Blue Sky law, and under the common law of Florida.

In broad terms, EOC claims to be entitled to relief on the basis of its allegations that it bought unregistered securities in the United States, being induced to do so by false statements and because material information was not disclosed to it, and that it was given further false information about the investments after purchasing them.

6. I have been asked to consider the following matters: —

(i) whether an English Court would assert jurisdiction over the Defendants in respect of the claims which EOC seeks to bring against them.

(ii) what causes of action and remedies would be available to EOC in proceedings before the English Court on the basis of the pleaded allegations.

(iii) the powers of the English Court to compel production of documents and to obtain evidence, and other aspects of the English Court system.

JURISDICTION

7. The foundation of jurisdiction of the English Court is the service of the writ or other originating process upon the Defendant. The rules as to legal service of a writ therefore define the limits of the Court's jurisdiction. However, this

is subject to the regulation of jurisdiction by the Brussels and Lugano Conventions, incorporated into English law by the Civil Jurisdiction and Judgments Acts ("CJJA"), 1982 and 1991. In my opinion, EOC would be able to effect service of English proceedings upon the Defendants and to pursue them here. Specifically the position of each of the four Defendants is as follows: —

(i) *Banque Paribas London ("Banque Paribas")*

8. I understand from Banque Paribas that it is a company organised and existing under the laws of France, the London bank being a branch of the French Corporation. I also understand that Banque Paribas has delivered notice to the Companies Registrar under section 695 of the Companies Act, 1985, giving its address at 33 Wigmore Street, London WlH 0BN as the place for service of any process. Section 695(l) provides as follows: —

> *"Any process or notice required to be served on an overseas company is sufficiently served if addressed to any person whose name has been delivered to the registrar under preceding sections in this Part and left at or sent by post to the address which has been so delivered."*

In these circumstances, as far as service of proceedings are concerned, Banque Paribas London would effectively be treated as present in England.

9. Moreover, although Banque Paribas has its "seat" in France and so is domiciled there under the CJJA 1982 and the

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Brussels Convention, the English Court would have jurisdiction under the Brussels Convention for two separate reasons:

(i) First, Article 5(5) of the Convention provides that, *"A person domiciled in a Contracting State may, in another Contracting State, be sued . . . As regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated"*.

(ii) Secondly, I understand from . . . that the purchase of the securities was governed by the terms of a Non-Discretionary Investment Agreement signed by EOC on 22nd October 1992, and that paragraph 30 of that agreement reads as follows: —

"This Agreement is governed by English law. Disputes arising out of this Agreement shall be subject to the jurisdiction of the English Courts to which for [Banque Paribas'] benefit [EOC] submit . . .".

This agreement would be, I believe, be interpreted under English law as an agreement to confer exclusive jurisdiction on the English court: see, for example, *Sohio Supply Co v. Gatoil (USA) Inc*, [1989] 1 Lloyd's LR 588. In any event, Article 17 of the Brussels Convention provides that, *"If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle*

any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction . . ."

(ii) *John Arida.*

10. I understand from Banque Paribas that John Arida is a salesman employed by Banque Paribas and that he is usually present in England, and in any event is domiciled here for the purpose of the Brussels Convention. In the circumstances EOC could serve an English writ upon him and pursue proceedings against him in England.

11. As to the mode of service upon John Arida, the position is governed by Order 10 of the Rules of the Supreme Court. Order 10 Rule 1 provides as follows:

"(1) A writ must be served personally on each defendant by the plaintiff or his agent.

(2) A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served —

(a) by sending a copy of the writ by ordinary first class post to the defendant at his usual or last known address, or

(b) if there is a letter-box for that address, by inserting through the letter-box a copy of the writ enclosed in a sealed envelope addressed to the defendant.

. . . .

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(3) Where a writ is served in accordance with paragraph (2) —

(a) the date of service shall, unless the contrary is shown, be deemed to be the seventh day . . . after the date on which a copy was sent to or, as the case may be, inserted through the letter-box for the address in question;

(b) any affidavit proving due service of the writ must contain a statement to the effect that —

(i) in the opinion of the deponent . . . the copy of the writ, if sent to, or, as the case may be, inserted through the letter-box for, the address in question, will have come to the knowledge of the defendant within seven days thereafter; and

(ii) in the case of service by post, the copy of the writ has not been returned to the plaintiff through the post undelivered to the addressee."

(iii) *Paribas Global Bond Futures Fund ("the Fund")*

12. I have seen a copy of the declaration of Pierre Corbiau, the secretary of the Fund, and note that the Fund is a corporation organised and existing under the laws of Luxembourg and that it has its principal place of business at 10A Boulevard Royal, 12093 Luxembourg. It has its "seat" in Luxembourg and is regarded under the Brussels Convention as domiciled there. (Luxembourg is one of the

Contracting States to the Convention). It does not have a registered place of business in England.

13. Under Article 6 of the Convention, a person domiciled in one Convention state may be sued as one of a number of defendants in the Court for the place where any one of those defendants is domiciled. This requirement would be satisfied in respect of the Fund by the English domicile of John Arida. It seems to me, therefore, that (assuming that the proceedings are brought also against John Arida) an English writ could be served on the Fund, and that the Fund could be sued in the English Courts.

(iv) *Paribas Asset Management Limited ("Paribas Asset Management")*

14. I understand that Paribas Asset Management is a company registered in the Bahamas and that it does not have a registered place of business in England. However, I have seen a copy of the declaration of Denis Coulon a director of Paribas Asset Management, which states that Paribas Asset Management is prepared to submit to the jurisdiction of the English Courts. In order to enable service of proceedings to be effected upon Paribas Asset Management, the company would therefore instruct agents in England to accept service of proceedings. I understand that the company would instruct Banque Paribas in London to accept service of proceedings on its behalf. This would be sufficient under English law effectively to establish the jurisdiction of the English courts over Paribas Asset Management.

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CAUSES OF ACTION AND REMEDIES AVAILABLE

15. I now consider the causes of action which EOC might pursue in English proceedings and what remedies it might have. I believe that English Court would recognise claims broadly comparable to those asserted in the US proceedings and award financial relief in respect thereof.

16. First, English law would entertain claims of misrepresentation similar to those pleaded in the U.S. proceedings. In particular, the English Courts allow rescission of contracts induced by misrepresentation, and also award damages for misrepresentation as follows:

    (i) for fraudulent misrepresentation. A representation is regarded as fraudulent both where it is made with knowledge of its falsity and where it is made recklessly, the representor not caring whether it be true or not.

    (ii) for negligent misrepresentation.

    (iii) for misrepresentation within the Misrepresentation Act, 1967. If EOC could show that a misrepresentation was made by the Defendants and that they relied on it in deciding to invest in the Fund, then EOC would have a claim under the Act unless the Defendants could show that the representation was made honestly and reasonably.

17. I would add the following comments about EOC's claims for misrepresentation:

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(i) if EOC relied on misrepresentations made by Mr. Arida, EOC could claim that Banque Paribas are vicariously liable in damages for his misrepresentations.

(ii) a statement would be treated as a misrepresentation if, though literally true, it bore false implications or omitted to mention matters so as to make the statement misleading.

(iii) the normal measure of damages for misrepresentation is such sum as would put the representee in the position in which he would have been had the misrepresentation not been made. If EOC was induced by misrepresentations to make its investment, its damages would by the difference between the money it invested and the value of the investment, together with fees paid and expenses incurred as a result of the investment.

18. Secondly, the Financial Services Act 1986 ("FSA 1986") applies to the regulation of investment business carried on in the UK. Section 1(3) provides as follows: —

"For the purposes of this Act a person carries on investment business in the United Kingdom if he —

(a) carries on investment business from a permanent place of business maintained by him in the United Kingdom; or

(b) engages in the United Kingdom in one or more of the activities which fall within the paragraphs in Part II

of that Schedule [Schedule 1] and are not excluded by Part III or IV of that Schedule [1] and his doing so constitutes the carrying on by him of a business in the United Kingdom."

19. The relevant activities of Banque Paribas London fall within the scope of the FSA 1986. I understand that it maintains a permanent place of business in London, from which it carries on investment business. Its activities come within the definition of *"investment business"*, which is set out in Schedule 1, Part II of the FSA 1986. The relevant paragraph is as follows: —

"Dealing in investments

12. Buying, selling, subscribing for or underwriting investments or offering or agreeing to do so, either as principal or as agent."

(The term "offering" is not to be interpreted in its strict contractual sense, but as including invitations to treat: see paragraph 28(1)(c) of the Schedule.)

20. Banque Paribas' dealings with EOC were governed by the Securities and Futures Authority ("SFA"). The SFA is a self-regulating organisation and has issued the SFA Rules pursuant to Section 8 of the FSA 1986. These Rules prohibit the making of unfair or misleading statements in relation to the provision of investment services. Rule 5-15 provides as follows: —

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"Fair and clear communications

(1) A firm may make an oral or written communication with another person which is designed to promote the provision of investment services only if it can show that it believes on reasonable grounds that the communication is fair and not misleading.

(2) A firm must take reasonable steps to ensure that any written agreement, communication, notification or information which it gives or sends to a private customer to whom it provides investment services is presented fairly and clearly."

21. Section 62 of the FSA 1986 provides a civil remedy in damages for breach of the SFA Rules. This remedy would be available to EOC provided it dealt with Banque Paribas as a *"private investor"*, a term is defined by The Financial Services Act 1986 (Restriction of Right of Action) Regulations 1991 (SI 1991 No. 489) so as to include companies which deal otherwise than in the course of carrying on business of any kind (1991 Regulations para 2(b)). I understand from Banque Paribas that EOC is used by Mr. Carr, its shareholder, for the purpose of purchasing and selling investments and that, as far as it is aware, EOC does not carry on business of any kind.

22. In these circumstances, EOC would have a remedy under the FSA 1986 in respect of its allegations about its purchase of the securities.

23. Thirdly, I understand that clause 1.2 of the Investment Agreement which governed the purchase of the securities, provides as follows:

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> *"All transactions will be subject. . . . to all applicable law, rules and regulations (collectively "applicable regulations") . . ."*

It would appear, therefore, that to the extent that Banque Paribas' dealings with EOC were subject to the provisions of U.S. securities laws, that law is incorporated into EOC's contract, and if and to the extent that Banque Paribas was in breach of U.S. securities laws, it would also have been in breach of contract. The Investment Agreement is expressed to be governed by English law, and under English law it would be open to EOC to claim damages for breach of such a term.

ENGLISH PROCEDURE

24. If EOC brought its claims in the English Courts, the procedure would be governed by the Rules of the Supreme Court. They provide for mutual discovery of documents and after the close of pleadings, all parties to an action must make discovery by exchanging lists of the documents which are or have been in their possession, custody or power and which relate to any matter in question between them in the action. Discovery extends to any document which it is reasonable to suppose contains information which may (not must) enable the party seeking discovery either to advance his own case or to damage that of his adversary, and documents fall within this category if they *"may fairly lead him to a train of inquiry, which may have either of these two consequences"*: see *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at p.63.

Appendix B

25. The duty to give discovery arises whether or not the party in question is resident in England and whether or not the documents are in England. In this case, therefore, assuming the English Court took jurisdiction over this dispute, all parties to it would be obliged to give discovery of all documentation within their possession, custody or power relevant to matters in dispute.

26. Another form of discovery is interrogation. Interrogatories are in the form of written questions asked of the parties as to matters in issue, which must, if the Court so orders, be answered in writing and on oath.

27. The English Courts can issue subpoenas requiring witnesses to attend Court for the purpose of giving evidence and/or producing documents. Such parties, however, must be present with the jurisdiction of the English Courts, since it is not permissible to serve a subpoena out of the jurisdiction. Evidence of witnesses who are abroad and are unwilling or unable to come to England may be adduced through letters rogatory or by statements admitted under the Civil Evidence Act 1968.

28. The speed with which an action comes up for trial in the English Courts depends largely on the following matters: —

    (i) the speed with which the Plaintiff pursues his action;

    (ii) the number and complexity of interlocutory applications made;

(iii) the length and complexity of the discovery process; and

(iv) the length of the trial.

29. Once pleadings have closed and discovery and inspection of documents has been completed, a trial date may generally be arranged. The delay in obtaining a trial date varies according to the length of trial, but by way of example a party would generally be able to obtain a date for a trial of one week's length within 6 to 8 months of applying for a date.

CONCLUSION

30. In my view, the English Court would provide an appropriate forum for the determination of the allegations made by EOC in its US Complaint and appropriate remedies if the complaints were established. I believe that the English Courts would consider these claims properly tried here, and in this context would refer to two matters in particular:

(i) first, as I have stated, my understanding is that EOC agreed that the English Courts should have jurisdiction — and, as English law would interpret the clause, exclusive jurisdiction — over any disputes arising out of the transaction. English Courts would enforce the agreement as to jurisdiction and, indeed, might well grant Banque Paribas an injunction to restrain EOC from continuing with the proceedings against them in the United States and also from instituting such proceedings elsewhere: see the *Angelic Grace* [1989] 1 Lloyd's LR 87).

(ii) Secondly, I refer to the background to the SFA 1986, and the public interest lying behind it. It was expressed by Steyn LJ in *Securities and Investment Board v. Pannell SA and ors*, [1993] Ch. 256 at p. 281 as follows: *"The genesis of these provisions was the widespread belief that the operations of share-pushers were damaging to the integrity of the markets, and contrary to the public interest. It was argued that the law should do more to ensure, not fairness, but honesty; in the carrying on of investment business in the United Kingdom."*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 12th April 1995

s/ Andrew Smith
ANDREW SMITH

Supreme Court, U.S.
FILED
JAN 6 1999
CLERK

No. 98-923

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,
Cross-Petitioners,

v.

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

NATHAN LEWIN
Counsel of Record
J. BRADLEY BENNETT
JODY MANIER KRIS
MILLER, CASSIDY,
LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

RICHARD H. DOLAN
SCHLAM, STONE & DOLAN
26 Broadway
New York, NY 10004
(212) 344-5400

Attorneys for Cross-Respondent

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the sale of unregistered securities to the cross-respondent by means of alleged false and fraudulent representations by the cross-petitioners. The representations were made to cross-respondent's only

principal and shareholder, Alan Carr. Mr. Carr is a citizen of Canada, but the securities were sold to cross-respondent, acting through Mr. Carr, while he was staying at his winter home in Florida. The courts below dismissed cross-respondent's fraud claim because, in their view, Section 10(b) of the Securities Exchange Act of 1934 and Section 12 of the Securities and Exchange Act of 1933 do not protect foreign entities from fraudulent practices by foreign sellers or from the sale of unregistered securities, even if the foreign seller uses instrumentalities of interstate commerce to target a buyer in the United States. As shown in our petition for writ of certiorari, this position taken by the courts below conflicts with the view of the Securities and Exchange Commission ("SEC") as set forth in the SEC's *amicus curiae* brief in the court of appeals and exacerbates an existing conflict among the circuits over the protection afforded by American securities laws to foreign citizens who purchase securities while they are present on American soil. The Second Circuit's decision also conflicts with principles articulated by this Court concerning the heightened deference that should be given to the SEC in the interpretation of its own rules and regulations.

The district court stated, as an alternative ground for the dismissal of cross-respondent's fraud claim, that the doctrine of *forum non conveniens* warranted dismissal. This finding of the district court was not addressed by the Second Circuit. Nor did the Second Circuit rely on *forum non conveniens* in affirming the decision of the district court.

The district court's *forum non conveniens* determination merely applied the considerations enumerated by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), to the peculiar facts of this case. While there was considerable dispute between the parties as to the relevant facts, there was no controversy as to the legal standard. In

short, the district court's *forum non conveniens* determination was the type of fact-bound ruling that has long been recognized as unsuitable for review by this Court. Moreover, we agree with cross-petitioners that its claim of *forum non conveniens* is not waived if the cross-petition is denied, and that issue may be revisited in the lower courts if the case is remanded.

REASONS FOR DENYING THE CROSS-PETITION

I

FORUM NON CONVENIENS IS A FACT-BOUND DETERMINATION THAT IS NOT SUITABLE FOR REVIEW ON WRIT OF CERTIORARI

It is axiomatic that this Court does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Indeed, "the absence of a legal controversy of importance or of a direct conflict as to legal issues will dictate a denial of certiorari in a case where merely the facts are in dispute." Robert L. Stern *et al.*, *Supreme Court Practice* 189 (7th ed. 1993). Relying on this rule, the Court has dismissed cross-petitions for certiorari as improvidently granted that, like cross-petitioner's, "presented [the Court] primarily with a question of fact." *NLRB v. Hendricks City Rural Elec. Corp.*, 454 U.S. 170, 177 n.8 (1981); *accord, Rudolph v. United States*, 370 U.S. 269 (1962) (*per curiam*); *Southern Power Co. v. North Carolina Public Serv. Co.*, 263 U.S. 508 (1924).

There are few issues that are as fact-bound as the application of the doctrine of *forum non conveniens*. As this Court emphasized in its discussion of *forum non conveniens* in *American Dredging Co. v. Miller*, 510 U.S. 443, 455

(1994) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1994)), the doctrine defies the use of "*per se* rules" because "each case turns on its facts." As a result, this Court, in accord with its general practice, has only granted certiorari in *forum non conveniens* cases to resolve questions of law. *E.g., American Dredging*, 510 U.S. 443 (certiorari granted to consider whether federal law pre-empts state law on *forum non conveniens* in Jones Act cases); *Reyno*, 454 U.S. 235 (certiorari granted to resolve conflict among the courts of appeals as to whether plaintiff could defeat motion to dismiss on *forum non conveniens* grounds by showing that the substantive law of the alternative forum is less favorable).

Cross-petitioners have not pointed to any ruling of law that requires review here. In the absence of such a showing, there is simply no issue presented that is worthy of review.

II

CROSS-PETITIONERS MAY RENEW THEIR *FORUM NON CONVENIENS* CLAIM IF THE CASE IS REMANDED

We agree with the cross-petitioners that they will be free to renew their defense of *forum non conveniens* if the case is remanded. But appellate review of the *forum non conveniens* issue is more appropriately undertaken in the first instance by the Second Circuit than by this Court. Because the resolution of the issue requires an extensive review of the factual record, this Court should rely on the Second Circuit to provide the appellate review which the cross-petitioners seek.

In any event, we submit that the district court's balancing of the relevant *forum non conveniens* factors under *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), would be reversed by the

Second Circuit if this Court determines, as we will be arguing on the merits if the petition is granted, that the United States has a substantial interest in protecting its residents against the fraudulent sales practices of foreign securities dealers (Pet. App. B, pp. 51a-52a).

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
J. BRADLEY BENNETT
JODY MANIER KRIS
MILLER, CASSIDY,
LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

RICHARD H. DOLAN
SCHLAM, STONE & DOLAN
26 Broadway
New York, NY 10004
(212) 344-5400

January 1999

Attorneys for Cross-Respondent